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Environmental Protection Division

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DIRECTOR'S OFFICE

**POWER4Georgians**

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AIR PROTECTION BRANCH

**VIA U. S. AND ELECTRONIC MAIL**

September 12, 2013

Mr. Judson H. Turner  
Director  
Georgia Department of Natural Resources  
Environmental Protection Division  
2 Martin Luther King Jr. Drive  
Suite 1152, East Tower  
Atlanta, GA 30334

**Re: Request for Extension of Time to Commence Construction Under  
Power4Georgians' PSD Air Quality Permit No. 4911-303-0051-P-01-0**

Dear Director Turner:

I am writing to request that the deadline for Power4Georgians, LLC (P4G) to commence construction of Plant Washington under Air Quality Permit No. 4911-099-0030-P-01-0 (the "Permit") be extended by 18 months. The justification for this extension is set forth below.

The applicable regulation authorizes the Director to grant this extension "upon a satisfactory showing that an extension is justified." *See* 40 C.F.R. § 52.21(r)(2), Ga. Comp. R. & Regs. R. 391-3-1-.02(7)(b)(15)(adopting 40 C.F.R. § 52.21(r)(2) by reference). As set forth below, the extension is fully justified and legally warranted.

The Director of EPD issued the Permit to P4G on April 8, 2010, authorizing the construction and initial operation of Plant Washington, a nominal 850 megawatt coal-fired electrical generating unit to be constructed in Washington County, Georgia. Condition 2.1 of the Permit states in pertinent part:

- 2.1 Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Division may extend the 18-month period upon a satisfactory showing that an extension is justified.... For purposes of this Permit, the definition of "commence" is given in 40 CFR 52.21(b)(9).

P4G's efforts to commence construction of Plant Washington, however, have been consistently stymied by events outside of P4G's control. First, following issuance of the Permit, environmental groups opposed to the project challenged the Permit in the Georgia Office of State Administrative Hearings. Although the Administrative Law Judge rejected all challenges to the permit conditions required under the PSD program, she reversed and remanded the Permit to EPD "for the sole and limited purpose" of revising the emission limits for the non-mercury metal and organic hazardous air pollutants (HAPs).

EPD issued the revised Permit on November 18, 2011. The same environmental groups filed yet another legal challenge on December 19, 2011, however, this time to the emission limit for mercury—a limit that these same environmental groups had expressly declined to challenge in the first proceeding and that they had publicly stated complied with all applicable requirements of the Clean Air Act and the Georgia Air Quality Act. P4G ultimately settled these claims, and the Administrative Law Judge entered a final decision on April 9, 2012, affirming all aspects of the Permit required under the PSD program. Thus, the effectiveness of P4G's Permit was automatically stayed—and P4G was prevented from commencing construction—from the time the first legal challenge was filed up through April 19, 2012.<sup>1</sup> See O.C.G.A. § 12-2-2(c)(2)(B) (stating that the filing of an appeal "shall stay such order or action until such time as the hearing has been held and for ten days after the administrative law judge renders his or her decision on the matter.")

While the administrative appeals of the Permit were pending and the effectiveness of the Permit was stayed, EPA took two regulatory actions that further prevented P4G from commencing construction on Plant Washington. First, on February 16, 2012, EPA issued its Mercury and Air Toxics Rule (known as the "MATS Rule"), which established the first-ever limits on new coal- and oil-fired electric generating units under Section 112 of the Clean Air Act. Unfortunately, the limits EPA established for new sources like Plant Washington were profoundly flawed, and so unreasonably stringent that pollution control equipment vendors would not issue guarantees that the limits could be achieved. Because such vendor guarantees are required in order to obtain construction financing in the marketplace, this flawed regulation effectively prevented P4G from commencing construction.

P4G sought administrative reconsideration of the MATS Rule's new-source limit for mercury. At the same time, P4G and a coalition of other new power plant developers filed a legal challenge to the MATS Rule in the United States Court of Appeals for the District of Columbia Circuit. On July 20, 2012, just days after the Court granted a request for expedited review filed by P4G and the other new unit developers, EPA announced that it would grant

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<sup>1</sup> This request for an extension is timely. Although the Permit was issued on April 10, 2010, the Permit's effectiveness was stayed under O.C.G.A. § 12-2-2(c)(2)(B) as a result of the administrative challenges. Thus, the Georgia statute effectively tolled the 18-month time limit during the period of the OSAH proceeding.

P4G's request for administrative reconsideration. P4G's legal challenges to the MATS Rule were accordingly stayed and the case abated while EPA undertook the reconsideration process.

This reconsideration process was not completed until April 24, 2013, when EPA published revised new-source standards applicable to Plant Washington. Until the reconsideration process was completed, however, P4G did not know what the final emission standards for Plant Washington would be, and whether those standards (unlike the previous version of the rule) would allow the construction of Plant Washington to move forward.

The flawed MATS Rule was not the only regulatory impediment to Plant Washington's construction that EPA created. On April 13, 2012, just months after the MATS Rule was initially issued, EPA proposed new source performance standards ("NSPS") for greenhouse gases (the "Proposed NSPS"). This rule would impose a strict emissions limit on new fossil-fuel fired power plants of 1,000 pounds of carbon dioxide per megawatt hour over a 30-year average.<sup>2</sup> EPA specifically acknowledged that Plant Washington could not comply with this emission limit, and that application of the standard might well force P4G to abandon its plans to construct the facility. For that reason, EPA proposed to exempt Plant Washington (and other "transitional sources") from the new standards if it commenced construction of the Plant Washington boiler within one year.

P4G sought to satisfy this deadline by executing contracts for fabrication and erection of the Plant Washington boiler on April 13, 2013. Unfortunately, EPA failed to promulgate the final NSPS within one year of proposal, as the Clean Air Act expressly requires. As a result, P4G was compelled to execute contracts for the construction of the Plant Washington boiler without knowing what the final greenhouse gas emission standards would be, and whether EPA would seek to apply them to Plant Washington.

Then, in June 2013, President Obama announced a major new climate initiative. As part of that initiative, the President directed EPA to issue new proposed greenhouse gas emissions standards for new power plants in September 2013 and to finalize those standards in 2014. Thus, it now appears that the Proposed NSPS will be withdrawn and replaced by new emission limits that have not yet been announced.

P4G cannot possibly complete the design and commence construction of Plant Washington until these standards are known. For example, there has been significant discussion as to whether new sources should be required to install carbon-capture-sequestration (CCS) systems to reduce their carbon dioxide emissions. A requirement to install CCS was included in the Proposed NSPS, and there is substantial pressure for it to be included in the new proposal as well. Assuming this is technologically feasible, and that a requirement for CCS is included in

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<sup>2</sup> P4G believes that this proposal is also profoundly flawed. The Proposed NSPS would establish a single emission limit applicable to both supercritical coal-fired units and highly efficient natural gas combined cycle facilities. This is unlawful under the Clean Air Act, but P4G must await the final standards in order to bring a legal challenge to this rule.

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the new proposed NSPS, P4G would need to know the specific requirements and would be required to modify the design of the Plant Washington facility to accommodate this requirement.

Condition 2.1 of the Permit expressly provides EPD with the discretion to approve extensions of the deadline to commence construction. The Georgia Rules for Air Quality further provide that the Director of EPD may extend the 18-month time limit provided for in Condition 2.1 of the Permit "upon a satisfactory showing that an extension is justified." Ga. Comp. R. & Regs. r. 391-3-1-.02(7)(b)(15) (incorporating by reference 40 C.F.R. § 52.21(r)(2)).

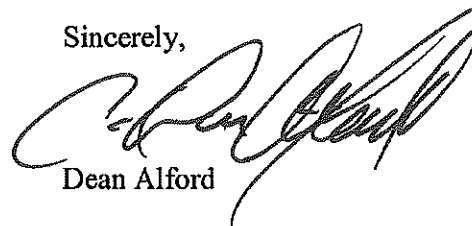
The fact that P4G has been thwarted in its efforts to commence construction of Plant Washington, combined with the regulatory morass created by EPA that continues to prevent P4G from completing the design of the facility and commencing construction, provide ample justification for extending the time limit contained in Condition 2.1 of the Permit. Indeed, P4G is aware that EPD extended the 18-month time limit for a coal-fired power plant based on delays resulting from legal challenges to its PSD permit, and that extension was affirmed on appeal. *See Flint Riverkeeper, et al. v. F. Allen Barnes, et al.*, 2011 Ga. ENV. LEXIS 8, *aff'd*, Fulton County Superior Court.

In sum, P4G has been diligently working to commence construction of Plant Washington since the Permit was issued in April 2010, and it remains committed to completing all the necessary steps to enable construction to commence. The Permit issued to P4G was, and remains, one of the most stringent air quality permits ever issued by EPD. Although P4G is making every effort to commence construction as quickly as possible, designs and construction arrangements cannot be finalized until the regulatory impediments EPA has created have been removed and the contents of the revised greenhouse gas rule are known.

P4G therefore respectfully requests that the Director of EPD approve the extension of the time period for the commencement of construction set forth in Condition 2.1 of the Permit for an additional 18 months.

Should you have any questions concerning the requested extension, please do not hesitate to contact me.

Sincerely,



Dean Alford

cc: Patricia T. Barmeyer, Esq.  
Les Oakes, Esq.



November 20, 2013

**VIA ELECTRONIC DELIVERY**

Keith Bentley  
Chief, Air Protection Branch  
Georgia Environmental Protection Division  
4244 International Parkway, Suite 120  
Atlanta, GA 30354

**Re: Power4Georgians NSPS Applicability Determination and PSD Permit  
Extension Request**

Dear Mr. Bentley:

**NSPS Applicability Determination**

On April 30, 2013, Power4Georgians, LLC (P4G) requested a determination from the Georgia Environmental Protection Division (GA EPD) concerning the applicability of certain New Source Performance Standards (NSPS) to Plant Washington. At that time, US EPA had proposed greenhouse gas emission standards for new EGUs. *See* US EPA, *Proposed Rule, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, 77 Fed. Reg. 22,392 (Apr. 13, 2012) (the "2012 Proposal"). The 2012 Proposal would have required all new coal-fired EGUs with a base load rating of more than 73 megawatts (250 MMBtu/h heat input) to emit no more than 1,000 pounds of CO<sub>2</sub> per megawatt hour on a 30-year average. *See* Proposed 40 C.F.R. §§ 60.5509, 60.5520. US EPA had acknowledged that Plant Washington could not possibly comply with this limit, and that P4G would be required to abandon its plans to construct Plant Washington if the proposed standard were to apply to Plant Washington. 77 Fed. Reg. at 22,421-22,424. Accordingly, US EPA had proposed to exclude Plant Washington from the NSPS for greenhouse gases as a "transitional source," so long as it commenced construction within "12 months after April 13, 2012." This was based on EPA's finding that "the proposed standard of performance for non-transitional sources of 1,000 lb CO<sub>2</sub>/MWh is not applicable to transitional sources because that standard is not based on the BSER [Best System of Emission Reduction] adequately demonstrated for transitional sources." *Id.* at 22,422. *See also* Proposed 40 C.F.R. § 60.5510(b)(3).

US EPA had a statutory obligation to finalize the 2012 Proposal within one year after April 13, 2012, *see* Clean Air Act § 111(b)(1)(B), 42 U.S.C. § 7411(b)(1)(B), but failed to promulgate the final standards within one year as required. This inaction placed P4G in a difficult situation. P4G was required to commence construction of the Plant Washington boiler by April 13, 2013 (12 months from the date of US EPA's proposal) to maintain its status as a transitional source, and US EPA expressly stated that this "12-month period would not be extended for any reason." 77 Fed. Reg. at 22,422. P4G therefore had to execute the contracts

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necessary to commence construction of Plant Washington's boiler before the terms of the final rule were known and the deadline for transitional sources expired. The April 30<sup>th</sup> submission to EPD, which included a copy of P4G's confidential boiler purchase and erection contracts<sup>1</sup>, was intended to enable EPD to confirm that P4G had, in fact, commenced construction and qualified as a transitional source under the 2012 proposal.

As you now know, US EPA never finalized the 2012 Proposal. Instead, on September 20, 2013, US EPA posted on the federal agency's website a notice of the withdrawal of the 2012 Proposal<sup>2</sup> and the re-proposal of those standards (the "Re-proposal").<sup>3</sup> To date, US EPA has not published its contemplated regulatory actions in the Federal Register. P4G understands, however, that US EPA will complete these actions in the very near future.

Pursuant to the Re-proposal, Plant Washington is classified as an existing source and exempted by name from the NSPS. See Re-proposal, pp. 163-67. If Plant Washington were later determined not to be an existing source, then the facility's greenhouse gas requirements would be established on a case-by-case basis. Importantly, the previous classification of Plant Washington as a "transitional source" has been eliminated. *Id.* For these reasons, P4G has concluded that the applicability determination that it sought in April has been mooted by the US EPA's subsequent regulatory actions. By this letter, P4G withdraws its request for an applicability determination, and P4G's attorneys will contact your office to arrange the recovery of our confidential contract documents.<sup>4</sup> In the future, P4G may again seek an applicability determination from the EPD concerning the commencement of construction of the Plant Washington boiler.

## PSD and MACT Permit Extensions

On September 13, 2013, P4G requested an extension of the date by which construction of Plant Washington must commence construction under Air Quality Permit No. 4911-099-0030-P-01-0 (the "Permit"). The September 13<sup>th</sup> letter requested that the date be extended by 18 months. While P4G had been waiting for US EPA to publish the Re-proposal in the Federal Register that is discussed above, we have determined that continuing to wait on the federal agency makes little sense. By the time that the EPD Director might issue a draft permit, the regulation will undoubtedly have appeared in the Federal Register. Accordingly, P4G requests that EPD begin the review and approval process for a permit amendment to extend the commence construction deadline as requested in the September 13<sup>th</sup> letter.

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<sup>1</sup> As explained in the April 30<sup>th</sup> letter, the boiler purchase and erection contracts contained Trade Secrets and Confidential Business Information ("CBI"), as defined under the Georgia Open Records Act, Georgia Trade Secrets Act, Georgia Air Quality Act, GA EPD regulations, and the US EPA's regulations.

<sup>2</sup> EPA-HQ-OAR-2011-0660 (Sept. 20, 2013).

<sup>3</sup> EPA-HQ-OAR-2013-0495 (Sept. 20, 2013).

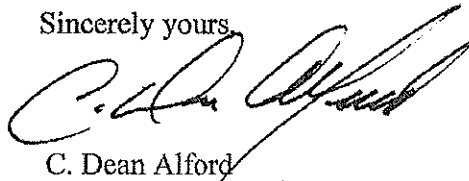
<sup>4</sup> *Purchase Agreement Between Power4Georgians, LLC and IHI, Inc., and Lump Sum Agreement for the Construction of the Steam Generator for the Plant Washington Project by and between Power4Georgians, LLC as Owner and Zachry Industrial, Inc. as Contractor.*

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Finally, P4G is making one additional request to EPD concerning the Permit. Condition 2.2 provides that "[t]he Notice of MACT Approval for the Coal Fired Boiler S1 and Auxiliary Boiler S45 shall expire if construction or reconstruction has not commenced within 18 months of issuance, unless the Division has granted an extension which shall not exceed an additional 12 months." P4G hereby requests that the Director grant the additional 12-month extension of the deadline established in Condition 2.2 for the same reasons that P4G requested in the September 13<sup>th</sup> letter that the PSD construction deadline be extended.

Following your review, please do not hesitate to contact Patricia Barmeyer or Les Oakes of King & Spalding or me if you or your staff require any additional information concerning these requests.

Sincerely yours,



C. Dean Alford

cc: Eric Cornwell (via e-mail)  
Patricia Barmeyer (via e-mail)  
Les Oakes (via e-mail)